

May 21, 2018

MEMORANDUM FOR THE WHITE HOUSE STAFF SECRETARY AND CABINET SECRETARY

FROM: Ryan Jackson, Chief of Staff, U.S. Environmental Protection Agency

SUBJECT: Environmental Protection Agency 30-Day Look Ahead for the Week of May 21, 2018

A. Events/Travel

- **May 22** – PFAS National Dialogue Meeting (DC)
- **May 23** – Speaking Engagement: Aerospace Industries Association (WV)
- **June 1** – Speaking Engagement: Delta Council (MS)
- **June 4** – Speaking Engagement: American Agri-Women DC Fly-In (DC)
- **June 8** – Speaking Engagement: Faith & Freedom Coalition Conference (DC)
- **June 8** – Speaking Engagement: Western Conservatives Summit (CO)
- **June 15** – West Virginia: Weirton Brownfields Grant, Mine Visit
- **June 25-26** – CEC Council Session: Mexican, American, and Canadian Environmental Ministers annual meeting hosted by US.

B. Top News

- **Summit, state visits will lead to national plan to manage PFAS** (Detroit Free Press, 5/22/18): “Today, I will kick off the agency’s first-of-its-kind National Leadership Summit on PFAS at EPA headquarters in Washington, D.C. Representatives from more than 35 states – including Michigan – more than 20 federal partners, several tribes, dozens of industry, non-governmental groups and other national organizations will share valuable recommendations for how EPA should deal with PFAS in communities and communicate the risks associated with PFAS. Our summit gives states, tribes and stakeholders a key voice in the EPA’s efforts. It also gives our federal partners an opportunity to share their expertise and coordinate actions.”
- **EPA adds defunct San Antonio facility site to cleanup priority list** (Fox San Antonio, 5/15/18): “The Environmental Protection Agency is working on a plan to clean up a hazardous waste site on the west side. The EPA says there are very high levels of chromium in the groundwater under a piece of land on Potranco Road about a mile outside Loop 1604. The site has been added to the EPA’s National Priority List, which is part of the Superfund program. Patillo estimates anywhere from 300 to 400 people live in the neighborhood. ‘We have two wells here in this subdivision,’ said Patillo. ‘We’re not on San Antonio water. So we were concerned this was getting down into that water system.’”
- **EPA sends air quality monitors to Hawaii Island** (West Hawaii Today, 5/17/18): “The U.S. Environmental Protection Agency has deployed emergency responders and air monitoring equipment to Hawaii Island as part of the Federal Emergency Management Agency’s response to the Kilauea volcano eruption, according to a press release from the EPA. The EPA is also sending experts to analyze public health threats from volcanic gas

emissions and to assist with data management support. The EPA is augmenting the multi-agency air monitoring efforts of acute threats to public health from the emission of volcanic gases. The agency is also working with the Hawaii Department of Health staff to evaluate locations for additional air quality monitoring stations, as well as to integrate the multi-agency air quality data collection efforts by US Geological Survey/National Park Service, County of Hawaii, state Civil Defense and state Department of Health. EPA has deployed four staff and will mobilize additional equipment and personnel to support 12 monitoring stations for sulfur dioxide, hydrogen sulfide and particulates and support DOH requests for assistance in collecting, managing and interpreting air monitoring data.”

C. Policy Updates

1. **PFAS SUMMIT:** On May 22 and 23, EPA is hosting a National Leadership Summit on per- and poly-fluoroalkyl substances (PFAS). On the first day of the summit, Administrator Pruitt presented the keynote speech to announce EPA’s four-step action plan. First, EPA will initiate steps to evaluate the need for a maximum contaminant level (MCL) for PFOA and PFOS. Second, EPA is beginning the necessary steps to consider a proposal designating PFOA and PFOS as “hazardous substances” through one of the available statutory mechanisms, including potentially CERCLA Section 102. Third, EPA is currently developing groundwater cleanup recommendations for PFOA and PFOS at contaminated sites and will complete this task by fall of this year. Fourth, EPA is taking action in close collaboration with our federal and state partners to develop toxicity values for GenX and PFBS.

Contact: Lee Forsgren, Office of Water, Forsgren.Lee@epa.gov

2. **SCIENCE TRANSPARENCY:** Consistent with Executive Orders 13777 and 13783, on April 24, 2018, Administrator Pruitt signed a proposed rule to strengthen the science used in regulations issued by EPA. The rule would ensure that the regulatory science underlying agency actions is fully transparent, and will require that the underlying scientific information be publicly available, in a manner sufficient for independent validation. This action builds upon prior EPA actions in response to government-wide data access and sharing policies, as well as the experience of other federal agencies in this space.

Timing: This week, EPA plans to publish a Federal Register notice extending the comment deadline for the proposed rule from May 30 to August 16. The same notice will announce a public hearing on July 17 at EPA Headquarters.

Contact: Richard Yamada, Office of Research and Development, Yamada.Richard@epa.gov

3. **CLEAN POWER PLAN:** Consistent with Executive Order 13783, in March 2017, Administrator Pruitt announced EPA’s review of the Clean Power Plan (CPP). In October, EPA issued a proposed rule to repeal the CPP. On December 18, EPA issued an Advanced Notice of Proposed Rulemaking (ANPRM) to open a 60-day comment period on a potential rule that would establish emission guidelines for states to establish performance standards for GHG emissions from existing Electric Generating Units (EGUs). The comment period for the proposed repeal closed on April 26.

Timing: EPA plans to send the proposed repeal to OMB in June.

Contact: Mandy Gunasekara, Office of Air and Radiation, Gunasekara.Mandy@epa.gov

- 4. DEFINITION OF “WATERS OF THE UNITED STATES”:** Consistent with Executive Order 13778, EPA and the U.S. Army Corps of Engineers are using a three-step process to review the 2015 rule defining “Waters of the United States” (WOTUS). In Step 0, the agencies extended the applicability date for the rule by 2 years. In Step 1, the agencies are withdrawing the rule and re-codifying the status quo. In Step 2, the agencies are reviewing and revising the definition consistent with this administration’s policy. In June 2017, the agencies issued the Step 1 proposed rule. On November 16, the agencies issued the Step 0 proposed rule. In January, the agencies issued the Step 0 final rule in the Federal Register. On April 11, the agencies sent a supplemental notice for the Step 1 proposed rule to OMB. **Timing:** The agencies plan to sign the supplemental notice for the Step 1 proposed rule and send a Step 2 proposed rule to OMB in May. **Contact:** Dave Ross, Office of Water, Ross.DavidP@epa.gov
- 5. RISK MANAGEMENT PROGRAM:** The original Risk Management Program (RMP) rule was issued in 1996, and has been modified 5 times. The prior administration issued a rule to amend the RMP regulations that raised concerns related to national security, inconsistencies with the Process Safety Management (PSM) standards issued by OSHA, and unnecessary burdens on local communities. In March 2017, Administrator Pruitt granted reconsideration of the RMP rule in response to petitions from two industry groups and one from a group of states, and issued a 90-day administrative stay of the rule. In June, EPA published a final rule to further delay the effective date of the rule until February 19, 2019. On March 9, EPA sent a draft reconsideration proposed rule to OMB for interagency review. The proposed rule: (1) rescinds requirements for third-party audits, STAA, root cause analysis; (2) revises the requirements for local coordination and emergency exercises; (3) rescinds requirements for information availability while strengthening provisions that require a public meeting after an incident; and (4) extends compliance dates. **Timing:** EPA plans host a public hearing on the reconsideration proposed rule on June 14. **Contact:** Veronica Darwin, Office of Land and Emergency Management, Darwin.Veronica@epa.gov
- 6. COAL COMBUSTION RESIDUALS:** In response to petitions for rulemaking from the utility industry, EPA decided in September 2017 to reconsider provisions of the final 2015 rule regulating the disposal of coal combustion residuals (CCR) as nonhazardous waste in light of the issues raised in the petitions and the Water Infrastructure Improvements for the Nation Act (WIIN Act), which includes provisions authorizing state regulatory programs and providing EPA new oversight authority. EPA issued a proposed rule to modify several provisions of the 2015 CCR rule to respond to a June 2016 voluntary remand (“remand rule”). In addition to the specific issues subject to the remand, EPA has drafted additional proposed changes to the CCR rule as part of the remand rule to address many of the issues stakeholders raised in their petitions. On March 1, 2018, Administrator Pruitt signed the first of two rules (Phases 1 and 2) that amend the 2015 CCR rule. The comment period for the proposed rule closed on April 30. **Timing:** EPA plans to send a Phase 1 partial final rule to OMB in May. **Contact:** Byron Brown, Brown.Byron@epa.gov

7. **COST-BENEFIT REFORM:** On April 10, 2018, Administrator Pruitt announced a forthcoming Advanced Notice of Proposed Rulemaking (ANPRM) to consider proposing regulations on cost-benefit reform. Under the Obama administration, EPA used questionable methods, like the social cost of greenhouse gases and relying on “co-benefits,” to inflate the purported benefits of its regulations and underestimate the true costs (as in the case of the Clean Power Plan). Additionally, several EPA statutes refer to the calculation of costs and benefits, but implementation has been inconsistent. This has led to EPA creating uncertainty for the regulated community. On April 11, EPA sent the ANPRM to OMB.
Timing: EPA plans to issue the ANPRM on June 7, 2018.
Contact: Brittany Bolen, Office of Policy, Bolen.Brittany@epa.gov
8. **MID-TERM EVALUATION (MTE) OF GREENHOUSE GAS STANDARDS FOR LIGHT-DUTY VEHICLES:** On April 2, 2018, Administrator Pruitt signed the new Midterm Evaluation (MTE) for the GHG emissions standards established for light-duty vehicles model years 2022-2025. The final determination found that, in light of recent data, the current standards are not appropriate and should be revised.
Timing: Administrator Pruitt announced the start of a joint process with the National Highway Traffic Safety Administration (NHTSA) to develop a notice and comment rulemaking to set more appropriate GHG emissions standards and Corporate Average Fuel Economy (CAFE) standards. The agencies plan to issue a joint proposed rule in the early summer.
Contact: Bill Wehrum, Office of Air and Radiation, Wehrum.Bill@epa.gov
9. **OIL AND GAS NSPS:** Consistent with Executive Order 13783, in April 2017, Administrator Pruitt announced EPA’s reconsideration of several aspects of the 2016 oil and gas New Source Performance Standards (NSPS). On March 1, 2018, EPA amended two provisions of the 2016 oil and gas NSPS to address immediate concerns with the fugitive emission requirements. On April 27, EPA sent the reconsideration proposed rule to OMB.
Timing: EPA plans to propose a technical package as part of the reconsideration of the 2016 oil and gas NSPS before it proposes a substantive policy package in June 2018.
Contact: Mandy Gunasekara, Office of Air and Radiation, Gunasekara.Mandy@epa.gov
10. **TSCA PROBLEM FORMULATION DOCUMENTS:** Under the amended Toxic Substances Control Act (TSCA), EPA is required to release problem formulation documents that describe exposure scenarios and populations that will be included in risk evaluations for various chemicals.
Timing: Within the next few weeks, EPA will release for public comment the draft problem formulations for the first 10 chemicals undergoing risk evaluations: 1, 4 Dioxane, 1-Bromopropane, Asbestos, Carbon Tetrachloride, Cyclic Aliphatic Bromide Cluster (HBCD), Methylene Chloride, N-Methylpyrrolidone, Pigment Violet 29, Trichloroethylene, and Tetrachloroethylene.
Contact: Nancy Beck, Office of Chemical Safety and Pollution Prevention, Beck.Nancy@epa.gov

11. TSCA – LAUTENBERG ACT 2ND YEAR ANNIVERSARY: Under the amended TSCA, EPA is required to meet more milestones which are coming due for its second anniversary of enactment, June 22, 2018. Those new milestones are the following:

- Mercury Use Reporting Rule: EPA will finalize reporting deadlines and requirements to assist in updating the inventory of mercury supply, use, and trade in the U.S.
- Alternative Animal Testing Strategy: EPA will issue a strategy to promote the development of alternative test methods to reduce vertebrate animal testing. On March 7, 2018, EPA released the draft strategy for public comment.
- Guidance on Generic Names: EPA will issue guidance regarding the determination of structurally descriptive generic names for chemicals.
- Policy on Unique Identifiers: EPA will issue a policy for assigning unique identifiers to chemicals and applying those identifiers to other information concerning the same chemical.
- Guidance on Confidential Business Information: EPA will issue guidance on expanding CBI access to states, tribes, and local governments; health and environmental professionals; and first responders.

Contact: Nancy Beck, Office of Chemical Safety and Pollution Prevention,
beck.nancy@epa.gov.

12. TSCA – LAUTENBERG ACT FEES: Under the amended TSCA, EPA is required to institute new fees on the chemical manufactures to fund the approval program for new chemicals. On February 8, 2018, EPA issued a proposed Fees Rule to provide funding for Lautenberg Act implementation, including risk evaluations and reviewing CBI.

Timing: The original comment deadline for the fees rule was extended from April 27 to May 24. EPA will continue to work with OMB to finalize the new fees rule. The President's Budget and the Appropriations Act propose changes to the programs' budget anticipating this new fee structure.

Contact: Nancy Beck, Office of Chemical Safety and Pollution Prevention,
beck.nancy@epa.gov.

13. DUST-LEAD AND LEAD-BASED PAINT: In 2009, EPA was petitioned to lower dust-lead hazard standards and modify the definition of lead-based paint. On December 27, 2017, the Ninth Circuit granted a petition for writ of mandamus to compel EPA to issue a proposed rule by March 27, 2018. On March 26, EPA received a 90-day extension to issue a proposed rule.

Timing: EPA plans to send a proposed rule to OMB in May.

Contact: Nancy Beck, Office of Chemical Safety and Pollution Prevention,
Beck.Nancy@epa.gov

14. SUPERFUND: The Superfund National Priorities List (NPL) was codified as Appendix B to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) in 1983. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund) requires that EPA maintain the NPL and update it at least annually. On May 15, EPA signed an NPRM adding 3 sites to the NPL (Donnelsville, OH; Penuelas, Puerto Rico; Grand Prairie, TX) and a final rule adding 6 sites (Hockessin, DE; Spencer, IN; Spring Park, MN; Cheraw, SC; Dallas, TX; San Antonio, TX).

Contact: Nick Falvo, Falvo.Nick@epa.gov

D. Grants/Loans

1. NEW WIFIA LOANS

- 2. \$285,744 TO THE COALITION TO RESTORE COASTAL COALITION:** These funds will help restore or enhance coastal swamp forest habitat near the city of New Orleans and provide volunteer opportunities that are accessible and accommodating to urban communities. This project will engage approximately 300 volunteers in adding 5,000 or more native swamp forest trees to restore or enhance at least 25 acres of cypress-tupelo swamp habitat.

Timing: EPA will issue a press release on May 23.

- 3. \$267,100 TO THE ARKANSAS DEPARTMENT OF HEALTH:** The agreement assists the state of Arkansas to develop and implement a public water system supervision program to adequately enforce the National Primary Drinking Water Regulations and the requirements of the Safe Drinking Water Act. Specific activities include: developing state drinking water regulations no less stringent than the federal regulations, maintaining an inventory of drinking water systems, managing information on public water systems, ensuring that public participation occurs regarding drinking water systems, providing technical assistance to public water systems and enforcing drinking water regulations.

Timing: EPA will issue a press release on May 30.

- 4. \$321,521 TO THE ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY:** This agreement will provide assistance to the Arkansas Department of Environmental Quality (ADEQ) in its efforts to implement air pollution control programs throughout the State of Arkansas, including continuing development and implementation of stationary source regulations; continuing promulgation and update of enhanced mobile source regulations; improvement of emission inventories for modeling simulations; and to operate a monitoring network that collects air data. These activities are to improve and maintain the public's air quality.

Timing: EPA will issue a press release on May 30.

- 5. \$821,775 TO THE ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY:** This agreement provides funding to the State of Arkansas to carry out its program to maintain, protect, and improve the water quality of its rivers, lakes, streams, groundwater, and other waterbodies. The environmental benefits of this program include preventing degradation of unimpaired waterbodies and reducing the number of impaired waterbodies in the state. Activities include: monitoring, standard-setting, TMDLs, surface and ground water enforcement and compliance activities and other water quality-related activities.

Timing: EPA will issue a press release on May 30.

- 6. \$2,170,000 TO THE NEW YORK STATE DEPARTMENT OF HEALTH:** The agreement assists the New York State Department of Health in the implementation of its

program to oversee and enforce drinking water programs and systems across the state. This includes: conducting annual reviews and sanitary surveys at all public water systems, providing technical project assistance, enforcing compliance with safe drinking water regulations.

Timing: EPA will issue a press release on May 31.

7. **\$35,397 TO THE DEPARTMENT OF PUBLIC HEALTH FOR DAYTON & MONTGOMERY COUNTY, OHIO:** The Regional Air Pollution Control Agency (RAPCA) will implement a comprehensive Air Pollution Control Program in Clark, Darke, Greene, Miami, Montgomery, and Preble counties. RAPCA will improve air quality by implementing measures to reduce stationary, area and mobile sources of air pollution in the RAPCA service counties with the goal of meeting the national ambient air quality standards. In addition, RAPCA will address air toxics, and support the State's air quality monitoring, enforcement, and permitting efforts.
Timing: EPA will issue a press release on June 4.
8. **\$45,865 TO THE HAMILTON COUNTY BOARD OF COMMISSIONERS (OHIO):** Hamilton County will implement a comprehensive Air Pollution Control Program in the County's program area. The recipient will improve air quality by implementing measures to reduce stationary, area and mobile sources of air pollution in Hamilton County with the goal of meeting the national ambient air quality standards. In addition, the recipient will address air toxics, and support the State's air quality compliance, enforcement, and permitting efforts.
Timing: EPA will issue a press release on June 4.
9. **\$43,150 TO THE OHIO DEPARTMENT OF NATURAL RESOURCES:** The Ohio Department of Natural Resources will utilize federal funding to conduct activities related to protecting underground water sources. Responsibilities and anticipated activities include permitting for conventional Class II injection wells, witnessing all cementing operations for Class II and Class III injection wells, inspecting Class II and Class III injection wells, maintaining the Underground Injection Control (UIC) enforcement database, and ensuring that UIC enforcement actions are completed in a timely manner.
Timing: EPA will issue a press release on June 4.
10. **\$149,600 TO THE ST. REGIS MOHAWK TRIBE (NEW YORK):** This agreement provides ongoing funding to the Saint Regis Mohawk Tribe to conduct activities that are not assignable to specific sites, but will support the recipient's site-specific hazardous waste response program. This includes training, development of non-site-specific plans and procedures, and the acquisition of equipment and supplies.
Timing: EPA will issue a press release on June 6.
11. **\$40,422 TO THE BAY MILLS INDIAN COMMUNITY (MICHIGAN):** This is a Performance Partnership Grant (PPG) to the Bay Mills Indian Community (BMIC) consisting of funds for the Clean Water Act (CWA) Section 106 and Section 319. This award will enable BMIC to build tribal environmental capacity, and implement the water resource and nonpoint source programs. These activities will protect human health and the environment.

Timing: EPA will issue a press release on June 11.

E. Legal Actions

- 1. STATE OF WEST VIRGINIA, ET AL. v. EPA, NO. 15-1363 (D.C. CIR.) – CLEAN POWER PLAN – CONTINUED ABEYANCE.** On April 28, 2016, the *en banc* court issued an order holding the litigation challenging the Clean Power Plan in abeyance and instructing the parties to file briefs on the question of whether the case should remain held in abeyance or whether the court should remand the rule to the Agency. On May 15, 2017, DOJ requested that the court hold the case in abeyance pending EPA’s review of the rule. The rule’s supporters have asked the court to remand the rule to EPA. On August 8, 2017, the D.C. Circuit ordered that the case remain in abeyance. The court directed EPA to continue to file status reports. The case remains in abeyance, and EPA continues to file status reports.
Timing: EPA filed its most recent status report on May 2, and asked the court to continue to hold the case in abeyance. On May 9, parties filed notices opposing EPA’s request for continued abeyance.
Contact: Erik Baptist, Senior Deputy General Counsel, baptist.erik@epa.gov.
- 2. OHIO VALLEY ENVIRONMENTAL COALITION v. PRUITT, NO. 17-1430 (4TH CIR.) – “CONSTRUCTIVE SUBMISSION” OF “NO TMDLS” BY WEST VIRGINIA – AWAITING ACTION BY THE COURT.** In February 2017, the District Court held that EPA must approve and/or disapprove West Virginia’s “constructive submission” of no biological impairment/ionic toxicity Total Maximum Daily Loads (TMDLs) for 573 water bodies in the State. In June 2017, EPA and West Virginia negotiated a Memorandum of Agreement, which includes parameters under which the state will submit TMDLs for these water bodies. Relying on this agreement, EPA “conditionally approved” the submission of “no TMDLs,” conditioned on the state meeting its obligations under the MOA, subject to the outcome of DOJ’s appeal of the district court’s determination in the Fourth Circuit. The case is now fully briefed. Various state-government and industry associations have filed *amicus* briefs in support of EPA’s position. On appeal, EPA is arguing that (1) plaintiffs lacked standing to sue regarding all but 50 of the contested waters; (2) the district court misapplied the “constructive submission” doctrine to West Virginia, a state with a robust TMDL program that is working to complete the TMDLs at issue; and (3) the district court’s decision was based on flawed factual assumptions about West Virginia’s TMDL development efforts. Oral argument occurred on May 8, 2018 in Richmond, Virginia.
Timing: Awaiting decision from the court.
Contact: David Fotouhi, Deputy General Counsel, fotouhi.david@epa.gov.
- 3. AIR ALLIANCE HOUSTON, ET AL. v. EPA, NO. 17-1155 (D.C. CIR.)—TWO-YEAR DELAY OF EFFECTIVE DATE IN RISK MANAGEMENT PROGRAM AMENDMENTS RULE — AWAITING ACTION BY THE COURT.** Petitioners, in consolidated cases, seek review of EPA’s final action titled “Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date.” at 82 Fed. Reg. 27,133 (June 14, 2017). Petitioners requested expedited consideration and summary vacatur or a stay of the delay rule. On August 30, 2017, the court denied the motion to stay or summarily vacate the rule. The court granted the motion to

expedite proceedings and ordered the court to set the case for oral argument. Briefing concluded on January 31, 2018. On March 9, 2018, EPA submitted to OMB for interagency review a proposed rule that, if finalized, would change certain provisions of the RMP Amendments Rule. Oral argument took place on March 16, 2018. On March 23, the Court ordered EPA to submit a comprehensive list of pre-2017 examples where any federal agencies have issued final notice-and-comment regulations (i) that change the effective or compliance dates for an earlier final regulation and (ii) that explicitly justify the change to the effective or compliance dates because the agency is reconsidering its earlier final regulation. EPA's response to the March 23 order was filed on April 6, 2018, and Petitioners' filed a response on April 16. EPA filed a 28(j) letter on May 17, 2018.

Timing: Awaiting action by the court.

Contact: David Fotouhi, Deputy General Counsel, fotouhi.david@epa.gov.

4. **SOUTHWESTERN ELECTRIC POWER CO. v. EPA, NO. 15-60821 (5TH CIR.)—2015 STEAM ELECTRIC ELG RULE—BRIEFING COMPLETED.** This is a challenge to EPA's 2015 steam electric effluent limitations guidelines rule. The case was held in abeyance while EPA determined which provisions of the rule it intends to reconsider. On August 14, 2017, DOJ asked the court to sever and hold in abeyance all proceedings relating to the portions of the 2015 Rule concerning the new, more stringent BAT limitations and PSES applicable to (1) bottom ash transport water, (2) FGD wastewater, and (3) gasification wastewater. The court granted DOJ's motion. Under the order, EPA will file status reports every 90 days. Industry petitioners will not press their claims in light of EPA's decision to reconsider parts of the rule. Environmental petitioners are proceeding with their claims against the 2015 rule. EPA filed a brief on claims not held in abeyance on December 15, 2017. Briefing completed on February 22, 2018. EPA filed status reports in November of 2017 as well as February and April of 2018. Oral argument has not yet been scheduled.
- Timing:** The parties are awaiting the scheduling of oral argument by the Court.
- Contact:** David Fotouhi, Deputy General Counsel, fotouhi.david@epa.gov.

5. **JULIANA v. UNITED STATES, NO. 15-01517 (D. OR.)/NO. 17-71692 (9TH CIR). MANDAMUS PROCEEDINGS – CLIMATE-CHANGE LITIGATION WITH CONSTITUTIONAL CLAIMS – DISTRICT COURT PROCEEDING.** This case is a broad-based challenge alleging that EPA and the US Government allowed excessive CO2 emissions from burning fossil fuel that have contributed to climate change. The district court denied our motion to dismiss. On June 8, 2017, the district court denied our motion for interlocutory appeal and our request to stay the proceedings. On June 9, 2017, we filed petition for mandamus with the Ninth Circuit seeking the same relief. On March 7, 2018, the 9th Circuit denied the petition for a writ of mandamus. On March 16, all Plaintiffs filed a motion for a hearing status conference. The District Court held a status conference via telephone on March 26, 2018, and a hearing on April 12, 2018. On May 9, DOJ filed a motion for judgment on the pleadings, moved for a protective order, and moved to stay discovery. The District Court has set various dates related to trial.
- Timing:** DOJ in conjunction with EPA and other named federal agency defendants are considering options for further review of the district court's action at this time. Oral argument regarding scheduling is set for May 23 via telephonic conference. A status conference is set for June 6, 2018 in Oregon.

Contact: Justin Schwab, Deputy General Counsel, schwab.justin@epa.gov.

6. **AMERICAN LUNG ASSOCIATION v. EPA, NO. 17-1172 (D.C. CIR.) –NOW-WITHDRAWN OZONE DESIGNATION DELAY – AWAITING ACTION BY THE COURT.** This is a Clean Air Act petition for review of EPA’s June 28, 2017 Federal Register notice extending the deadline for area designations for the 2015 ozone NAAQS. On August 3, 2017, EPA published a Federal Register notice withdrawing the June 28 notice and clarifying that, going forward, it will exercise its designation-delay authority for those areas where technical, informational, and methodological questions make it impossible to designate by the statutory deadline. Challengers moved for summary vacatur of the deadline extension or, in the alternative, a stay of the extension pending judicial review of the merits. On August 3, 2017, DOJ moved the court to dismiss the challenge as moot, and challengers opposed. On October 6, 2017, the court granted the challengers’ alternative request to hold the litigation in abeyance and deferred consideration of the remaining motions pending further order of the court. On November 8, 2017, EPA filed a 28(j) letter informing the court of a final rule which made air quality designations for some areas. EPA then filed a status report on January 12, 2018 wherein EPA identified with “precision and specificity” when the Agency plans to file a final rule establishing air quality designations for the 2015 ozone NAAQS for areas that remain undesignated. EPA filed a Status Report on May 15, 2018 detailing the status of all final designations for the 2015 ozone national ambient air quality standards. (EPA finalized designations for all areas except San Antonio on April 30, pursuant to a court order entered in another case. San Antonio must be designated by July 17.)

Timing: The court has deferred action on pending motions.

Contact: Justin Schwab, Deputy General Counsel, schwab.justin@epa.gov.

7. **NATIONAL PARKS CONSERVATION ASSOCIATION v. EPA, NO. 11-cv-1548 (D.D.C.) & SIERRA CLUB v. EPA, NO. 10-cv-1541 (D.D.C.) – TEXAS REGIONAL HAZE & INTERSTATE POLLUTION TRANSPORT – CASE STAYED.** Under two consent decrees entered in separate deadline/mandatory duty suits under the previous administration, EPA must either issue a Federal Implementation Plan (FIP) or approve a State Implementation Plan (SIP), to satisfy the Clean Air Act’s requirements for Texas’s obligations under (1) the Best Available Retrofit Technology (BART) prong of the Regional Haze program (the *National Parks* case), and (2) the “good neighbor” provision addressing interstate pollution transport (the *Sierra Club* case). On August 18, 2017, EPA filed motions with both courts requesting extension of the consent decree deadlines to the end of 2018, attaching a Memorandum of Agreement between EPA and the state environmental agency, as well as a letter from Governor Abbott, laying out Texas’s commitment to develop and submit for EPA’s approval a SIP establishing an intrastate trading program to satisfy both the BART/haze requirements and the interstate transport requirements. The district court denied the request for a long-term extension. EPA issued a FIP on September 29, 2017. Plaintiffs on October 13, 2017 filed a statement of position and motion to enforce the consent decree, arguing that the FIP did not satisfy EPA’s consent decree obligations and requesting that the court order EPA to finalize within 30 days the previous administration’s proposed source-by-source BART FIP. DOJ filed a response and a motion to terminate the consent decree on October 25, 2017. This issue is now fully briefed. On March 6, 2018, the Court issued a Minute Order staying this case. The Court will hold in abeyance any decision on whether to

enforce or terminate the consent decree pending the resolution of plaintiffs' petition for reconsideration of the Rule promulgated by the EPA on October 17, 2017 and/or plaintiffs' appeal of that Rule in the Fifth Circuit. The parties filed joint status reports on May 3 and May 11, 2018.

Timing: The Court will continue the stay in this case. EPA must notify the Court within a week of the publication of the notice of proposed rulemaking in the Federal Register, or file a status report on June 22, 2018 if nothing has been filed by that date.

Contact: Justin Schwab, Deputy General Counsel, schwab.justin@epa.gov.

8. UTILITY SOLID WASTE ACTIVITIES GROUP V. EPA, NO. 15-1219 (D.C. CIR.) – CHALLENGE TO COAL COMBUSTION RESIDUAL (CCR) RULE – AWAITING DECISION.

Industry petitioners and environmental groups challenged EPA's final rule entitled "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities," 80 Fed. Reg. 21,302 (April 17, 2015). On May 12, 2017, USWAG submitted a Petition to reconsider provisions of the CCR Rule and to hold in abeyance the current challenge to the CCR Rule. The Administrator sent a letter to these petitioners on September 13, 2017 indicating that the Agency would reconsider the rule in light of the issues raised in the petitions and the Agency's new authority under the Water Infrastructure Improvements for the Nation ("WIIN") Act. On September 18, 2017, DOJ filed a motion to, among other things, hold the case in abeyance in light of this impending reconsideration. The court deferred ruling on EPA's request for abeyance, delayed oral argument, directed EPA to file a status report specifying which portions of the rule the agency intends to reconsider and the specific timeline for reconsideration, and directed the parties to file supplemental briefing addressing the relevance to this case of the WIIN Act. On November 7, 2017, DOJ filed a motion for voluntary remand of six provisions of the CCR rule that EPA intends to reconsider. EPA filed a status report regarding reconsideration on November 15, 2017, and oral argument occurred on November 20, 2017. Since that time, several 28(j) letters have been filed.

Timing: EPA is awaiting a decision.

Contact: David Fotouhi, Deputy General Counsel, fotouhi.david@epa.gov.

9. MASSACHUSETTS RIVERS ALLIANCE v. EPA, NO. 17-cv-11825 (D. MASS.)—APA 705 STAY OF MASS. MS4 PERMIT—MOTION FOR SUMMARY JUDGMENT FILED.

Massachusetts Rivers Alliance and nine other environmental groups filed a complaint against the EPA in U.S. District Court in Massachusetts with regards to EPA's June 29, 2017 action under Section 705 of the Administrative Procedure Act ("APA") to postpone the effective date of the Massachusetts small MS4 (municipal separate storm sewer system) general permit by one year, from July 1, 2017 to July 1, 2018. Multiple parties had already challenged the general permit in the First Circuit and the D.C. Circuit Court of Appeals; the cases have been transferred and consolidated in the D.C. Circuit, and we are now awaiting its decision on whether to hold those cases in abeyance indefinitely to allow for the parties to pursue court-sponsored alternative dispute resolution. Briefing concluded in January of 2018.

Timing: Awaiting action from the Court.

Contact: David Fotouhi, Deputy General Counsel, fotouhi.david@epa.gov.

10. MARYLAND v. PRUITT, NO. 17-2873 (D. MD.)— FAILURE TO TAKE ACTION ON MARYLAND’S CAA SECTION 126 PETITION—BRIEFING COMPLETE.

The State of Maryland, through the Maryland Department of the Environment, filed suit against the EPA alleging a failure to take mandatory duties associated with the State’s CAA Section 126 Petition. That petition asked the EPA to issue a finding that 36 electric generating units located in Indiana, Kentucky, Ohio, Pennsylvania, and West Virginia are in violation of the prohibition of 42 U.S.C. § 7410(a)(2)(D)(i), commonly referred to as the “good neighbor provision” (i.e., that emissions from these sources are contributing to air pollution issues in Maryland). The complaint alleges the agency failed to hold a hearing and failed to issue a decision within the statutory time limits.

Timing: The case is fully briefed. The court will either rule on the pleadings or schedule a hearing.

Contact: Justin Schwab, Deputy General Counsel, schwab.justin@epa.gov.

11. SAFER CHEMICALS HEALTHY FAMILIES v. EPA, No. 17-72260 (9TH Cir.) – CHALLENGE TO TSCA PRIORITIZATION RULE AND RISK EVALUATION RULE – RESPONSE BRIEF DUE.

On November 27, 2017, the Ninth Circuit denied EPA’s motion to transfer the petitions for review of the TSCA prioritization rule to the Fourth Circuit. The court consolidated the various challenges to the TSCA framework rules and then issued a briefing schedule. Petitioners filed their opening brief on April 16, 2018.

Timing: EPA’s response brief is due on July 5, 2018.

Contact: David Fotouhi, Deputy General Counsel, fotouhi.david@epa.gov.

12. CLEAN AIR COUNCIL V. UNITED STATES, No. 2:17-cv-04977 (E.D. Pa.)— CLIMATE-CHANGE LITIGATION WITH CONSTITUTIONAL CLAIMS – MOTION TO DISMISS BRIEFING.

The Clean Air Council and two minors represented by their guardians filed a complaint in the District Court for the Eastern District of Pennsylvania against the United States, President Trump, the EPA (and its Administrator), and the Department of Energy (and its Secretary), alleging that those entities have engaged in or initiated “rollbacks” of several initiatives related to climate change and the electric power sector. According to the plaintiffs, these actions violate two aspects of the U.S. Constitution: (1) A fundamental right to “a life-sustaining climate system and an atmosphere and oceans that are free from dangerous levels of anthropogenic CO₂,” embodied in the Fifth and Ninth Amendments; and (2) a federal “public trust doctrine” that is rooted in both common law and the Fifth and Ninth Amendments. The plaintiffs seek (1) declaratory relief that the federal defendants “cannot effectuate or promulgate any rollbacks” that exacerbate “the life-threatening effects of climate change based on junk science,” in such a way that would violate those alleged constitutional rights, as well as (2) any “other and further relief” the court deems just and proper. DOJ’s motion to dismiss Plaintiffs’ Amended Complaint has been fully briefed.

Timing: The pretrial conference date is yet to be determined. On May 3, 2018, the Court denied DOJ’s original motion to dismiss as moot. Briefing on DOJ’s supplemental motion to dismiss (filed per the amended complaint) is still ongoing.

Contact: Justin Schwab, Deputy General Counsel, schwab.justin@epa.gov.

13. STATE OF NEW YORK V. PRUITT, ET AL., No. 18-1030 (S.D.N.Y.); NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. V. EPA, ET AL., No. 18-1048 (S.D.N.Y.); SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, ET AL., V. PRUITT, ET AL., No. 18-330 (D.S.C.) - CHALLENGES TO THE APPLICABILITY DATE RULE FOR THE WATERS OF THE UNITED STATES RULE –MOTIONS TO TRANSFER PENDING.

To date, EPA has received three challenges to the Army Corps and EPA's rule adding an applicability date to the 2015 Rule defining "waters of the United States" under the Clean Water Act (CWA). Plaintiffs are seeking an order vacating the rule, claiming that the agencies promulgated the rule in excess of statutory authority and in violation of the Administrative Procedure Act (APA) and CWA. The complaints alleged that the agencies failed to consider or provide a meaningful opportunity for public comment on the implications of suspending the 2015 Rule and reinstating the pre-2015 regulatory scheme. Moreover, the complaints allege that the rationale for the rule is not supported by the record, and that the agencies acted arbitrarily and capriciously by, among other things, failing to consider how adding an applicability date would meet the CWA's objectives. On February 14 and 15, 2018 respectively, DOJ filed motions to transfer in all three cases. The contested motions each ask that the respective case be transferred to the Southern District of Texas. The Southern District of New York has not yet ruled on these motions to transfer. The District Court in South Carolina denied EPA's motion to transfer. On May 1 and May 3, Plaintiffs filed motions for summary judgment in the two Southern District of New York cases. DOJ filed an answer in all cases on May 18.

Timing: In the Southern District of New York, EPA's opposition to the motion for summary judgment is due 30 days from the date of the Court's opinion on the pending motions to transfer.

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14. MEXICHEM FLUOR, INC. v. EPA, No. 15-1328 (D.C. CIR.) – CHALLENGE TO 2015 CLEAN AIR ACT RULE ON SUBSTITUTES FOR OZONE-DEPLETING SUBSTANCES – PETITIONS FOR REHEARING DENIED.

On July 20, 2015, EPA published a final rule, "*Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes under the Significant New Alternatives Policy Program.*" The July 2015 Final Rule changed the listings of a number of hydrofluorocarbon (HFCs) from acceptable to unacceptable for use in some refrigeration, aerosol, and foam blowing uses. The rule was challenged by Mexichem and Arkema, two chemical producers. On August 8, 2017, in *Mexichem Fluor v. EPA*, the U.S. Court of Appeals for the D.C. Circuit remanded the rule in part and vacating the rule to the extent it requires anyone who is already using alternatives to ozone-depleting substances (ODS) (e.g., HFCs) in lieu of ODS to switch to another substance. The Court upheld the SNAP rule to the extent that it applies to anyone who is still using an ODS from moving into the HFCs whose listings were changed. Several parties petitioned the D.C. Circuit to rehear the case. On January 26, 2018, the Court denied those rehearing requests.

Timing: On March 12, 2018, the D.C. Circuit received notice from the U.S. Supreme Court that the time within which to file a petition for writ of certiorari has been extended to June 25, 2018.

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